U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A71 596 039 - Los Angeles Date: MAY 29 1996

In re: ADAN LOPEZ-MEDINA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ana Maria Herrera Murray, Esquire
Pasadena Legal Center
829 North Lake Avenue
Pasadena, California 91104

ON BEHALF OF SERVICE: Patricia M. Corrales
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - Entered without inspection

APPLICATION: Suspension of deportation; voluntary departure

I. PROCEDURAL HISTORY

The respondent is a 38-year-old native and citizen of Mexico who entered the United States without inspection in 1986. On February 12, 1993, the Immigration and Naturalization Service issued an Order to Show Cause, charging him with being deportable on that basis, pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(B). At an Immigration Court hearing on April 16, 1993, the respondent admitted the factual allegations in the Order to Show Cause and conceded deportability as charged. He stated his intention to apply for suspension of deportation under section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1), and for voluntary departure under section 244(e) of the Act, 8 U.S.C. § 1254(e).

The Immigration Judge held a hearing on the respondent's applications on April 24, 1995. In a decision issued at the conclusion of the hearing, the Immigration Judge found the respondent deportable on the charge set forth above and denied his application for suspension of deportation. He granted the respondent a period of voluntary departure, with an alternative order of deportation to Mexico if the respondent failed to depart by the prescribed date. The respondent has appealed from the denial of his application for suspension of deportation. The appeal will be dismissed.

II. EVIDENCE

The respondent is married. His wife and two older children, ages 13 and 12, are citizens of Mexico. Like the respondent, they are in the United States without legal immigration status. His third child, age 5, is a U.S. citizen (Exh. 2, Tr. at 72). He testified that he came to the United States in 1986 after completing 18 years of schooling and working for a time in Mexico. He came with his wife and two older children because he could not support his family adequately on what he was earning in Mexico (Tr. at 71-72). All three of the children are fluent in English and Spanish (Tr. at 76). He has worked full-time in a hospital since 1990. His wife also works full-time. Their combined family income is approximately $24,000 per year. They are healthy, but recently he has been very anxious. He is subject to high blood pressure, and on one occasion he had to visit the emergency room (Tr. at 53, 77-78).

The respondent testified that he and his family are active in their local Catholic parish and that they have many friends in the United States (Tr. at 80-81). He testified that his mother and all his siblings are in the United States in legal immigration status. Some of them had been listed on his Application for Suspension of Deportation (Form I-256A) as living in Mexico, but the respondent stated they have all since come to the United States. He did not, however, have any proof of their legal immigration status (Exh. 2, Tr. at 81-86).

The respondent testified that he has considered leaving his U.S. citizen son with relatives in the United States if he is ordered deported. He stated that he has no family left in Mexico, but possibly some friends. He is terrified at the prospect of returning (Tr. at 95-97). It is possible that his wife and two older children might attempt to remain in the United States and apply for suspension of deportation because they have been here 7 years. If he were deported, the most difficult thing would be the impact on his family: "Mostly for them to stay here or to live with me, that for me would be to destroy my family" (Tr. at 97). Even if the other members of his family come with him if he is deported, he will be separated from his youngest son, who needs both parents if he is to grow up properly (Tr. at 98).

A psychologist also testified concerning the effects of deportation on the respondent and his 5-year-old son. He testified that the respondent has been suffering anxiety and depression over the prospect of deportation and its effect on him and his family (Tr. at 52-53). The psychologist stated that deportation would also be very difficult for the 5-year-old. On the one hand he could suffer separation from his father and possibly other members of his family, and on the other he would be forced to live in a new culture against his wishes and those of

everyone else in his family (Tr. at 57-58). In a written evaluation the psychologist described serious emotional consequences that would result for the child if he were separated from his family, and also related the child's fears about moving to Mexico (Exh. 3-6). The evaluation concludes that if the family becomes fractured and disjointed, it will cause extreme and unusual hardship for the child (Id.).

The 5-year-old child testified briefly as well. He stated that he would be sad if his father were deported, that he wanted to remain in the United States, and that he can speak and understand Spanish (Tr. 103-105).

The Service stipulated to the respondent's good moral character, and therefore several witnesses who had submitted written statements of reference were not called. (Tr. at 107, Exh. 3-8). The Service did object, however, to the introduction of translated newspaper articles concerning current conditions in Mexico, because the translations did not contain a certification of accuracy pursuant to 8 C.F.R. § 3.33. The Immigration Judge sustained the objection as to five of the articles (Tr. at 35-39, I.J. at 2-3). One other article was admitted (Exh. 3-7).

III. DECISION OF IMMIGRATION JUDGE

In his decision issued at the conclusion of the hearing, the Immigration Judge reviewed the evidence, including the testimony of the psychologist, and determined that while the respondent had established the required 7-years' residence and had shown his good moral character, he had not shown that his deportation would cause extreme hardship for him or for his 5-year-old child. The Immigration Judge noted that the child was in his first year of formal schooling, is fluent in Spanish and English, and has no medical problems. He concluded that deportation for this child would cause less hardship than that experienced by the children in INS v. Wang, 450 U.S. 139 (1981). In that case the Supreme Court upheld the denial of suspension of deportation despite the fact that the children in that case were older and did not speak the language of the country of deportation (I.J. at 11).

The Immigration Judge acknowledged that the respondent will lose his job, but stated that job loss is normal in such situations. He concluded that the respondent's loss would be comparatively less than that experienced by the aliens in INS v. Wang, supra, and noted that the respondent was bilingual and understood the culture in Mexico (I.J. at 11, 15). The respondent suffers no serious medical problems, the Immigration Judge concluded, and although he has experienced anxiety recently, such feelings are normal for persons facing deportation (I.J. at 11). The Immigration Judge discounted the effect of the possible separation of the respondent from his mother and siblings, noting that the

respondent had not proven that they had permission to reside permanently in the United States and that instead there was evidence that some of them resided in Mexico (I.J. at 14).

The Immigration Judge determined that the respondent had also failed to establish that relief was warranted in the exercise of discretion. He noted evidence that the respondent had misrepresented information on his federal tax returns (I.J. at 12-13). He noted that the respondent has no strong ties to organizations in the United States other than the Catholic church, and he observed that the respondent would be able to practice his Catholic faith in Mexico (I.J. at 14-15). He also noted that the respondent has assets of approximately $19,000 that could help him establish a new life in Mexico. (I.J. at 14).

IV. ARGUMENTS ON APPEAL

On appeal, the respondent asserts that the Immigration Judge erred in excluding documents about country conditions in Mexico and that he mischaracterized the respondent's tax filings. The respondent also contends that the Immigration Judge failed to give adequate consideration to the hardship that the child would experience upon his father's deportation. Finally, he argues that the Immigration Judge did not consider the hardship that the respondent would experience at being unable to provide for his children and at being separated from other members of his family. On appeal the Service argues that the Immigration Judge properly excluded the translated articles for failure to comply with 8 C.F.R. § 3.33.

V. DISCUSSION

A. Excluded evidence

The respondent offered translations of six articles concerning country conditions in Mexico (Tr. at 35-39). One of the documents (Exh. 7) consisted of the article in Spanish, an English translation, and a certification by the translator that he is competent to translate the document and that the translation is true and accurate to the best of his abilities. The Immigration Judge accepted this document in evidence (Exh. 3-7). The other five, however, consisted of articles and translations, accompanied by a copy of a certificate of competency for the translator issued by the Administrative Hearing Interpreter Program for the State of California (Respondent's Brief, Exh. A). There was no statement by the translator that he is competent to translate and that the translations are true and accurate to the best of his abilities. Since such requirements are clearly stated in the regulations at 8 C.F.R. § 3.33, the Immigration Judge properly excluded these documents from the record.

B. Eligibility for tax deductions

During the hearing (Tr. at 87-95) and in his decision (I.J. at 12-13) the Immigration Judge questioned the propriety of several tax deductions that the respondent claimed on returns filed with the Internal Revenue Service. On appeal the respondent argues that these deductions were permissible and that the Immigration Judge's suspicion of tax fraud detrimentally influenced his evaluation of the evidence of extreme hardship. We do not consider here whether the respondent properly could claim his undocumented children as dependents several years in a row, or whether he could also claim his niece and mother as dependents. In his opinion, the Immigration Judge found the respondent to be a person of good moral character, and we determine that his discussion of the tax liability is essentially unrelated to the issue of whether the respondent established extreme hardship. We see absolutely no indication that the Immigration Judge's concern about improper tax filings had any effect on his evaluation of the other evidence in this record.

C. Extreme hardship

We confine our analysis of extreme hardship in this case to the effects of deportation upon the respondent and his 5-year-old child. The respondent's wife and two older children are not citizens or lawful permanent residents and therefore, under section 244(a)(1) of the Act, the direct effect of the deportation upon them is not a factor in our analysis. Similarly, although there is evidence that at least some of the respondent's brothers and sisters are lawful permanent residents (Exh. 2), section 244(a)(1) does not permit consideration of any hardship they would suffer should the respondent be deported.

Extreme hardship is not a definable term of fixed and inflexible meaning. Rather, the elements that establish extreme hardship are dependent upon the facts and circumstances of each case. See Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978); Matter of Kim, 15 I&N Dec. 88 (BIA 1974); Matter of Sangster, 11 I&N Dec. 309 (BIA 1965).

The Board has enunciated factors relevant to the issue of the extreme hardship determination. These factors include: the length of the respondent's presence over the minimum requirement of 7 years; the respondent's age both at entry and at the time of application for relief; the presence of lawful permanent resident or United States citizen family ties to this country; the respondent's family ties outside the United States; the conditions in the country or countries to which the alien is returnable and the extent of the respondent's ties to such countries; the financial impact of departure from this country; significant conditions of health, particularly when tied to an unavailability

of suitable medical care in the country to which the respondent will return; whether the respondent demonstrates special assistance to the community; and, lastly, the possibility of other means of adjustment of status or future entry into this country. See Matter of Anderson, 16 I&N Dec. 596 (BIA 1978).

In considering all factors relevant to a determination of extreme hardship, the Supreme Court has indicated that a narrow interpretation of the term is consistent with the exceptional nature of suspension relief. INS v. Wang, supra; see also Bu Roe v. INS, 771 F.2d 1328 (9th Cir. 1985).

Economic loss alone does not establish extreme hardship, but it is still a factor to consider in determining eligibility for suspension. Jong Shik Choe v. INS, 597 F.2d 168 (9th Cir. 1979). The Board must also consider personal and emotional hardships which result from deportation. Tukhowinich v. INS, 57 F.3d 869 (9th Cir. 1995); Chan v. INS, 610 F.2d 651 (9th Cir. 1979). The most important single factor may be the separation of the alien from family living in the United States. See Mejia-Carrillo v. INS, 656 F.2d 520 (9th Cir. 1981). All relevant factors bearing on extreme hardship must be considered individually and cumulatively. See Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981). Although one factor by itself might not support a finding of extreme hardship, all factors considered cumulatively may do so.

1. The respondent

The respondent argues that he had difficulty in the past supporting his family and that should he be deported he "would no longer be able to provide for his children's living expenses including their private schools in the way that he can now" (Respondent's Brief at 23). We recognize that economic conditions in Mexico are likely to result, at least temporarily, in a lower standard of living for the respondent and his family. However, such economic difficulties are a frequent result of deportation, and the respondent has not shown that his would be so severe as to constitute extreme hardship. See Jong Shik Choe v. INS, supra. The respondent has substantial education, has amassed some savings in the United States, and is familiar with the language and culture in Mexico. We do not conclude that he would be totally unable to support his family if he returned to Mexico, and therefore we do not regard the economic adversity as constituting an extreme hardship in this case.

Likewise, although we acknowledge the anxiety that the respondent is currently experiencing over the prospect of deportation, we do not regard his medical condition as evidence that he would suffer extreme hardship if deported. As the Immigration Judge noted, such anxiety is not unusual among persons

in the respondent's circumstances. The record does not contain evidence that the respondent suffers from any condition that would not be treatable in Mexico. Therefore, while noting that the deportation is a source of anxiety, we do not conclude that it will cause extreme emotional hardship.

The third source of hardship identified by the respondent is the separation from family members in the United States. We acknowledge that such separation can be a source of great hardship See Mejia-Carrillo v. INS, supra. In this case, however, no such showing has been made. The respondent testified that even if he were deported, his wife and children might seek to remain in the United States by applying for suspension of deportation. At this moment, however, they have no legal immigration status in this country. Therefore, in the absence of any evidence that they would be entitled to remain legally in the United States, we conclude that they would depart the United States if the respondent were ordered deported. If, however, they elected not to do so and sought instead to remain in the United States, the resulting separation would be a matter of their personal choice to immigrate, not a consequence of his deportation.

The youngest child, of course, is a U.S. citizen and the respondent testified that he might leave the child behind. Although as a U.S. citizen the child has a right to remain in this country even if the other members of his family depart, absent proof of extreme hardship to the child if he returns to Mexico with his family, we would also view such a decision as a matter of parental choice, not as a consequence of deportation. See Matter of Ige, Interim Decision 3230 (BIA 1994). Since, as discussed infra, we conclude that accompanying his family to Mexico would not result in extreme hardship for the youngest child, we conclude that any separation of him from the respondent will not be a forced consequence of the deportation.

In addition to his wife and children, the respondent has other family members in the United States. Although there is conflicting evidence about how many of his relatives actually have legal immigration status in this country (Exh. 2, Tr. at 81-86, I.J. at 14), we acknowledge that the respondent will experience some separation if deportation were to occur. Nevertheless, it is possible that the respondent's mother and siblings could visit and otherwise maintain contact with him, even if he were to be deported to Mexico. Therefore, we find that there is insufficient evidence in the record to permit us to characterize any such separations as constituting extreme hardship for the respondent.

Accordingly, upon our examination of the record we conclude that the respondent has not established that he would suffer extreme hardship if he were to be deported to Mexico.

2. The respondent's son

The fact that the respondent has a U.S. citizen child does not in itself justify suspension of his deportation. See Matter of Correa, 19 I&N Dec. 130 (BIA 1984); Matter of Kim, supra. The fact that economic opportunities and educational or medical facilities for the child are better in the United States than in Mexico does not establish extreme hardship for him. Id. We recognize that families moving from the United States to other countries frequently encounter difficulties in the transition, but those difficulties, even for U.S. citizen children, typically do not constitute extreme hardship under section 244(a)(1) of the Act. Id.

In this case, both the respondent and his spouse are from Mexico and are familiar with the culture. The child is young and in good health. He is fluent in English and Spanish, and his family would be able to practice their Catholic faith in Mexico. His father completed 18 years of schooling in Mexico, and there is no evidence that the child would not also be able to take advantage of educational opportunities there. While the respondent might not be able to support his family at the same standard of living they experienced in the United States, he has education and experience, and there is no reason to conclude that he would not be able to find employment.

We acknowledge that there would be adjustment difficulties for every member of the family, but there is nothing in the record to suggest that the child would experience more severe adjustment problems than other American-born children of Mexican couples in similar situations. We note that the psychologist testified that the child's adjustment to Mexican society would be made more difficult because other members of his family would be going there involuntarily. We do not ignore the impact that family stress might have upon the child's adjustment to life in Mexico. Nevertheless, we do not see evidence in the record that this stress would be of such magnitude as to constitute an extreme hardship.

Finally, accompanying his family to Mexico would necessarily involve some separation from relatives who would remain in the United States. We did not find that such separation would cause extreme hardship in the respondent's case, and the respondent presented no evidence of the anticipated impact of such separation on his child. Therefore, in the absence of such evidence, we conclude that separation from extended family in the United States will not be a source of extreme hardship for the child.

In sum, we recognize that there would be some adjustment difficulties if the child were to accompany his family to Mexico, as there are in every case of children whose parents are deported

from the United States. However, we find no unique circumstances that would elevate this child's anticipated difficulties to the level of extreme hardship.

If, on the other hand, the respondent determines that his wife and children will attempt to remain in the United States, or that just the U.S. citizen child will remain behind, the child will be confronted with the fragmentation of his family. Given the evidence in the record of a strong family relationship, we acknowledge that this separation could easily cause emotional hardship for this U.S. citizen child. Nevertheless, we do not view that unfortunate result as a direct consequence of the deportation. In Matter of Ige, supra, we considered the situation of U.S. citizen children whose parents faced deportation and indicated they might leave their children behind in the United States. As noted above, we stated in Matter of Ige that as a matter of law we consider the critical issue to be whether the children would suffer extreme hardship if they accompanied their parents abroad. In that case, as in the case here, we found that no extreme hardship would ensue if the children went with their parents. We concluded, therefore, that any hardship the children would face if left in the United States would be the result of their parents' choice, not their parents' deportation. Similarly here, we conclude that any hardship the respondent's child would suffer if his parents chose to leave him behind would be a consequence of the parents' decision, not the order of deportation. Matter of Ige, supra.

3. Aggregating the factors

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. See Santana-Figueroa v. INS, supra. In this case, we aggregate the economic and emotional harm that the respondent will suffer with the economic and emotional harm that his child will suffer. We acknowledge that moving or returning to Mexico will pose challenges for each member of the respondent's family. We do not ignore or minimize those challenges and their possible collective impact upon the respondent and his youngest child. Nevertheless, we see no unique circumstances in this case that would raise this aggregate difficulty to the level of extreme hardship. Rather, we conclude that this aggregate difficulty is not distinguishable from that which would typically be experienced by a family deported to Mexico after a 9-year period of life in the United States. Since we find nothing about deportation to Mexico in itself that would constitute extreme hardship for a family in such circumstances, we conclude that extreme hardship has not been proven in the case of the respondent and his child.

VI. CONCLUSION

Because we do not find that deportation would cause the respondent or his son to suffer extreme hardship, we conclude that his application for suspension of deportation must be denied. See Bu Roe v. INS, supra; Jong Shik Choe v. INS, supra; Matter of Anderson, supra. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

FOR THE BOARD

File: A71 596 039 - Los Angeles Date:

MAY 29 1996

In re: ADAN LOPEZ-MEDINA

DISSENTING OPINION: Lory D. Rosenberg, Board Member

I respectfully dissent.

My differences with the majority are as much about the applicable law and this Board's method for analyzing and deciding suspension of deportation claims, as about the outcome of this particular claim on appeal. In effect, the majority concludes that because the respondent will not suffer total financial deprivation in Mexico and wouldn't be totally unable to provide for his family, his anticipated economic hardship cannot be termed extreme; that because the respondent and son could maintain some of the activities that provide emotional sustenance here in the United States, their emotional hardship is likewise not extreme; that because any hardship caused by a dissolution of the family unit is either the result of parental choice or could be ameliorated by visitation, it cannot be viewed as extreme; and that assessed cumulatively, the hardship that respondent and his family would experience as the result of his deportation has little ultimate impact on our evaluation, as it is not unique, and therefore, not extreme. Majority Decision (Maj.) at 6-9.

I do not agree for two principal reasons. First, in my opinion, the majority fails to address adequately the individual hardship factors asserted by the respondent on his own behalf and that of his son.[1] Their analysis, while generally consistent with the approach followed by this Board in our past precedent decisions in this area, simply does not accord the proper weight to each of the factors and circumstances that the respondent claims will constitute hardship for him and his entire family.

The respondent has lived in the United States for ten years in a close knit family unit with his wife and children, surrounded by an extended family network. As head of household, he has put down roots, made an honest living, and developed substantial and

[1] Under the governing statute, it is the hardship to the respondent and the respondent's United States citizen six year old son that is relevant. See § 244(a)(1) of the Act., 8 U.S.C. 1251(a)(1).

commendable personal ties to his church and to his community. Deportation to Mexico would require the severing of these ties, the uprooting of these roots, and the disrupting of his, his wife's and his children's equilibrium as a family unit. Moreover, it would undermine the respondent's role as a provider for his family, it would result in a cognizable Hobson's choice concerning the diminution of economic and educational opportunities available at least to his United States citizen son, resulting in serious emotional consequences to both father and child, and it would cause a drastic change in the entire family's standard of living and quality of life causing significant hardship to both the respondent and his son.

Second, I believe that in attempting to consider the effect of these individual hardship factors in the aggregate, the majority invokes an improper standard. Instead of considering the degree of the particular hardship to the respondent and his family, the majority seems to resort to what I believe can only be described as a standard of "comparative suffering". This leads the majority, in essence, to assert that the respondent's and his family's hardship cannot be extreme because it is common, particularly to Mexican-American families in the United States who have American-born children. Maj. at 8.

Standing alone, such an interpretation of "extreme hardship" arguably might pass muster. However, as I discuss herein, taken in the context of the statutory framework and legislative history, the Board's own precedent decisions in Matter of Anderson, 20 I&N Dec. 888 (BIA 1994), Matter of Ige, 20 I&N Dec. 880 (BIA 1994), and Matter of Pena-Diaz, 20 I&N Dec. 841 (BIA 1994), and the decisions of the circuit court of appeals for the circuit in which this appeal arises, the legal interpretation upon which the majority bases its decision in this case is erroneous.

I. ANALYSIS OF SUSPENSION OF DEPORTATION STANDARDS

In my view, despite an arguably objective set of factors meant to guide our determination of what constitutes "extreme hardship", Matter of Anderson, 16 I&N Dec. 596 (BIA 1978), this Board has been excessively and unnecessarily restrictive in its approach to requests for suspension of deportation under section 244(a)(1) of the Act. One part of that problem is due, I conclude, to the Board's failure to recognize and distinguish the two standards present in the suspension statute: "extreme hardship" in section 244(a)(1), and "exceptional and extremely unusual hardship" in

section 244(a)(2).[2] Another part of the problem may be attributed to methodology: the Board's failure to meaningfully identify and properly weigh the factors in determining hardship.

A. Historical Overview: One standard or two?

1. Statutory Background

This Board's discussions of suspension of deportation in cases arising in the past thirty years involve primarily determinations of whether the alien has made a showing of extreme hardship. It is worth noting that when the first suspension provision was enacted in 1940, the required showing was only "serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien." Act of June 28, 1940, 54 Stat. 670, 8 U.S.C. § XXX (19XX). In 1952, for a variety of reasons, the socio-political pendulum swung in the opposite direction and Congress enacted the far more restrictive standard of "exceptional and extremely unusual hardship." See Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952), former section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1) (1958).

Ten years later, Congress retreated from this position, and while it retained "exceptional and extremely unusual" as the standard for relief under section 244(a)(2), it required only "extreme hardship" for section 244(a)(1) cases. See Act of October 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247, former section 244(a), 8 U.S.C. § 1254(a) (1964). In 1994, Congress added section 244(a)(3) of the Act providing suspension for abused spouses having continuous physical presence of at least three years, who would suffer "extreme hardship" if deported.[3] While the statute itself does not address expressly the difference between the two standards, the choice of

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[2] Section 244(a)(1) of the Act relates to persons charged with immigration entry and status violations; section 244(a)(2) of the Act relates to persons charged with violations involving criminal, documentary and security offenses.

[3] Extreme hardship is the standard specified in section 212(h) of the Act, 8 U.S.C. § 1182(h), which waives exclusion causing hardship to designated family members. See Matter of Mendez-Morales, Interim Decision 3272 (BIA 1996) (while projected family separation and economic detriment constitute extreme hardship, waiver denied in exercise of discretion). It also is one ground for waiving a conditional permanent resident's failure to file a joint petition for removal of the statutory condition on his of her status. See § 216(c)(4)(A), 8 U.S.C. 1186a(c)(4)(A).

language, as well as the legislative history, indicates clearly that "exceptional and extremely unusual" hardship contemplates a degree of suffering, not only greater, but more unique and individual than that anticipated by one who would suffer "extreme" hardship.

2. BIA Precedent Decisions

I recognize the elasticity in the terms "extreme" and "exceptional and extremely unusual" when used to describe human hardship. However, there exist in the statute two separate and independent standards which govern different categories of persons requesting suspension of deportation. While it may be inevitable that fair minded individuals could disagree over whether a particular situation presents a showing under either of these standards, we must give effect to each of these sections while recognizing the existence of the other. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)(Board may not blur the distinctions between two related but separate statutory standards or reduce them into one); Matter of Hou, 20 I&N Dec. 513 (BIA 1992)(Congress' use of two separate standards requires the Board to give each independent effect).

In earlier cases decided following the 1962 amendments, the Board acknowledged the change in terminology of the statute and articulated various factors relevant to the "extreme hardship" determination. Notably, there was no comparative measure invoked in these decisions.[4] Over the past twenty years, however, the Board has applied an increasingly restrictive interpretation, at least to the former of the statutory terms,[5] that appears to disregard the

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[4] See reported decisions in which extreme hardship was found, e.g.; Matter of Louie, 10 I&N Dec. 223 (BIA 1963) (adult with wife and children abroad, having eleven year residence coupled with dependency of elderly father; Matter of Lum, 11 I&N Dec. 295 (BIA 1965) (adult with thirteen year residence combined with loss of income from part ownership of restaurant); compare, reported cases in which no extreme hardship was found, e.g., Matter of Hwang, 10 I&N Dec. 448 (BIA 1964) (adult student of eight years with no ties in U.S. and possibility of no suitable employment abroad); Matter of Sangster, 11 I&N Dec.309 (BIA 1965) (adult student of ten years with no equities and only some economic detriment in returning to teaching profession abroad); Matter of Marques, 15 I&N Dec. 200 (BIA 1975) (nonimmigrant sheepherder of apparent substantial means who faces denial of insurance benefits if deported).

[5] See e.g., Matter of Kim, 15 I&N Dec. 88 (BIA 1974) (unproven claim of lesser economic and educational opportunities for (continued...)

distinction between the two standards.[6]

3. Federal Court Decisions

This Board's determination that extreme hardship requires more than mere economic detriment was addressed and found by the Supreme Court to be authorized. INS v. Wang, 450 U.S. 139 (1981)(per curiam). The majority in this appeal, following the course taken by the Immigration Judge, invokes that decision repeatedly, almost as if it were a mantra.

It may be argued that Wang set some benchmark endorsing this Board's interpretation of access to suspension of deportation relief under the extreme hardship standard - one which admittedly has enjoyed consistent acceptance by the federal courts. It is notable, however, that Wang involved not a straightforward claim of suspension of deportation, but one presented in the context of a motion to reopen, where the Board found no prima facie showing of economic or educational hardship to exist for two affluent, college educated Korean parents and their children. Id.[7] Moreover, closely

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(...continued)
nonimmigrant student couple with pre-school age children insufficient to establish extreme hardship); Matter of Anderson, 16 I&N Dec. 596 (BIA 1978) (adult resident of eight years having spouse with medical condition and facing adverse political and economic conditions in homeland unable to demonstrate an aggregate of factors beyond economic detriment).

[6] Compare, Matter of Pena-Diaz, supra, discussed infra. See also, exceptional and extremely unusual hardship as construed under 1952 Act, in which the more stringent standard was met, e.g., Matter of S-, 5 I&N Dec. 409 (BIA 1953) (standard satisfied by 27 year residence, limited savings and prospect of severe financial hardship); Matter of W-, 5 I&N Dec. 586 (BIA 1953) (standard satisfied by residence of 9 years by married female with 5 dependent children having few assets); but see Matter of V-, 7 I&N Dec. 348 (BIA 1956)(nine years residence by stowaway with no dependents and no home to be broken up doesn't meet standard).

[7] Scholars, litigators and courts alike have recognized the confusion worked by attempting to construe judicial decisions concerning extreme hardship when such adjudications are "prima coupled with motions to reopen which independently impose a "a facie showing" standard, as well as the exercise of discretion. See e.g. Aleinikoff, Martin and Motomura, Immigration Law and Policy, 653,
(continued...)

read, the Supreme Court in Wang acknowledged only that a narrow interpretation was not precluded by the statute. And, even if Wang does represent the acceptance of this Board's adoption of a narrow interpretation of what constitutes extreme hardship, nowhere does Wang suggest that hardship which may be experienced commonly cannot, nonetheless, be deemed extreme.

In any case, what has not found consistent acceptance in the federal courts is the method we employ for determining the degree or gauging the hardship. While courts regularly accept many of our discretionary decisions as a matter of deference to the agency, it is not infrequent to see decisions remanded for a perceived failure to consider one or more aspects of the hardship that will result from deportation. See, e.g. Mejia-Carrillo v. United States, 656 F.2d 520 (9th Cir. 1981) (failure to consider the non-economic hardships resulting from removal); Ravancho v. INS, supra. (Failure to consider psychiatric information). See also, Tukhowinich v. INS, 57 F.3d 869 (9th 1995)(failure to consider adequately role as sole provider for undocumented family here and abroad); Watkins v. INS, 63 F.3d 844 (9th Cir. 1995) (failure to consider all factors including spouse's hardship, fear of persecution, and child's inability to master a foreign language); Salameda v. INS, 70 F.3d 447 (7th Cir. 1995)(failure to adequately consider hardship to undocumented child and respondent's wrenching separation from community ties); Cerillo-Perez v. INS,809 F.2d 1419 (9th Cir 1987)(failure to adequately consider hardship to qualifying family members); Dulane v. INS; 46 F. 3d 988, 944-96 (10th Cir. 1995)(failure to consider all factors); Turri v. INS, 997 F.2d 1306 (10th Cir. 1993) (failure to consider substantial involvement and work in the community); Saldana v. INS, 762 F.2d 824 (9th Cir. 1985), modified, 785 F.2d 650 (9th Cir. 1986)(failure to consider all relevant factors); Batoon v. INS, 707 F.2d 399, 402 (9th Cir. 1983)(same). I believe that some if not all of these remands result from an unstated displeasure with the severity and impropriety with which we construe the term "extreme hardship."

B. What is extreme?

While we engage in a case-by-case determination in adjudicating suspension claims, any analysis of factors such as those in Matter of Anderson must be measured against some set of criteria. The question therefore becomes; when should we apply the adjective

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666; Note: Developments in the Law--Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286, 1396 (1983); Ravancho v. INS, 658 F.2d 169 (3rd Cir. 1981).

"extreme" to a sum of human hardship and how do we distinguish this level of inconvenience, discomfort, suffering, misery, or privation from that which either is ordinary, or that which is "exceptional and extremely unusual"?[8]

I submit that two elements are involved in this assessment. The first is the level or degree of hardship -- the personal suffering or misery that the person will experience. This includes the unique character of the suffering, but not the extent to which others who may be similarly situated would or would not experience the same type of hardship to the same extent. The second involves at least an equivalently high-level of hardship plus evidence of its unique, not commonly experienced, character.

Given the mandated statutory distinctions, the Board's decision in Matter of Pena-Diaz, 20 I&N Dec. 841 (1994), our only decision in the past thirty years to address "exceptional and extremely unusual" hardship, is instructive. While it may be argued that the outcome was influenced in part by the unusual circumstances of the Service's intermittent acquiescence to the respondent's continued presence in this country after an order of deportation, that is precisely the point under the standard applied in that case. As I read the decision, the hardship factors presented by the alien (long residence, family ties, steady employment, participation in community affairs, lack of another means to adjust) are not materially of greater degree and certainly not unique compared to those we see in many typical 244(a)(1) suspension cases today.

How can it be that our one decision addressing the higher standard, exceptional and extremely unusual hardship, appears so

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[8] In a related context, the standard of "exceptional hardship", capable of meaning both greater and different than ordinary hardship, is used to determine eligibility for obtaining one type of waiver of the foreign residence requirement. Section 212(e) of the Act; 8 U.S.C. 1182(e). While such waivers ostensibly are outside the jurisdiction of the Board, a number of precedent decisions rendered by the Service find it to encompass, without regard to whether it is unique, circumstances of professional career interruption, poor nutrition and lesser education for children, and family separation. See e.g., Matter of Habib, 11 I&N Dec. 464 (1965); Matter of Iberra, 13 I&N Dec. 277 (1968). Compare, "Hardship Waivers for J-1 Physicians, 94 Immigration Briefings, No. 2 (1994)(exceptional and extreme hardship standards are substantially the same). Whether construing an intermediate standard or one interchangeable with extreme hardship, those precedent decisions have some bearing on our own consideration.

indistinguishable factually from cases adjudicated and denied under the extreme hardship standard? I believe it stems from the confusion between the two standards and the way we assign values to what is extreme. We have elevated our "extreme hardship standard artificially by rejecting evidence of hardship that might be experienced by others. In assessing "extreme" hardship, our point of reference is the individual, and we measure only the first element, the level of suffering. What is out of the ordinary, or of significant impact, for that individual can be "extreme." While the plain language, "extreme", may require an inquiry into the degree of suffering to be experienced by an individual, it does not require that hardship be either unique or unusual.

I believe that this construction is not only consistent with Wang, which addressed only the degree and not the comparative level of projected suffering, but best gives meaning to our precedent decisions, including especially, Matter of Anderson, supra, which specifies that a combination of individual factors could result in extreme hardship. A comparative construction would render that seminal precedent decision virtually meaningless because it always would be possible to point to some or all of the factors involved as those commonly experienced by others. Thus, my proposed construction both gives meaning to each of the standards in the statute and reconciles our precedents.

II. Applying The "Extreme Hardship" Analysis To Specific Cases

A. Extreme hardship May Be based Upon Individual Factors or Upon Their Cumulative Impact

In a line of cases before and after Matter of Anderson, this Board articulated and discussed the relevant hardship factors, invariably finding that the particular hardships were less than extreme. It is most important to note that these precedents, apparently continuing to respond to the legislative changes between the 1940 and 1952 enactments, emphasize repeatedly, that economic hardship alone, cannot support a finding of extreme hardship. Consequently, a comprehensive evaluation of several single factors, taken together, is implicit in Matter of Anderson. Although the Board acknowledged the requirement of cumulative consideration of the factors in Matter of Ige, supra, we were generally silent, however, about ways in which the standard could be satisfied, and instead offered only a compendium of instances where the required showing of extreme hardship could not be made.

The precipitating factor for this apparent litany of rejections, in my view, is not, that in over twenty years, this Board was not

presented with a single appeal worthy of publication by an applicant who could meet the extreme hardship standard. Rather it is that this Board has persisted in taking each individual factor, judging it not to rise to the level of being hardship in the extreme, and then proceeding to dismiss it in the aggregate. Despite acknowledging in words that extreme hardship may be established by cumulative evidence, the Board has systematically discounted individual indicia of such cumulative hardship. See Watkins v. INS, 63 F.3d 844 (9th Cir. 1995).

The instant case is a prime example of such a doomed adjudication. While properly citing the relevant case law interpreting the standard of "extreme hardship", including that applicable to cases such as this one, arising in the Ninth Circuit, the majority adopts a formula that either improperly refutes or inaccurately rationalizes the evidence of hardship presented by the respondent.

B. Application and Assessment of relevant hardship factors

There are six fundamental factors, discussed below in the context of the instant case, that I believe should be addressed in virtually every case to determine the severity of the hardship that an individual may experience if deported. Individual cases, of course, might suggest other factors, and they would require consideration as well. Had the relevant factors been recognized and aggregated properly by the majority in reviewing this appeal, I believe they would compel a different result than that which the majority reached.

First, the length and quality of time in the United States: The statute sets 7 years continuous physical presence as the statutory requirement for suspension under section 244(a)(1). We should assume, therefore, that those who can make such a showing have fully satisfied one of the statutory requirements for relief. We should not, as some of our recent unpublished cases have done, disparage 7-year or 8-year periods as "barely satisfying the statutory minimum," implying that hardship cannot really begin until the period of presence is longer. This is not only contrary to the treatment of length of residence in our precedents, see note 5 supra, but where Congress has set the qualifying standard at 7 years, we should not apply a different one. While longer periods of residence might elevate the degree of hardship, the weight to be given to this equity is not to be diminished by reason of its proximity to the statutory minimum. See Matter of Arrequin, Interim Decision 3247 (BIA 1995).

The respondent has lived in the United States for almost a decade. As discussed below, during this 10-year period the respondent developed a strong personal and economic attachment to this country. His two oldest children came here as infants, and his third child was born in this country. This span of time obviously represents a significant and productive segment of the respondent's life. He has established roots here and has a stake in American society; while he did not arrive during adolescence, he nonetheless has become acculturated and identifies as a member of our society. Compare, Matter of Ordonez, Interim Decision A23 726 233 (BIA 1996). The record reflects that the abrupt termination of his residence and attachments would be a source of hardship to him.

Second, the extent of economic adversity: While economic detriment alone may be inadequate to establish extreme hardship, economic adversity still can be a component of the personal hardship that may befall a deported alien. Our decisions should recognize and discuss in some manner the full extent of this impact. See, e.g., Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981). They should not simply dismiss this factor merely because it is common or because, by itself, it is insufficient to make the required showing. For example, see Matter of Lum, supra, in which the Board granted relief to an alien who had resided in the United States for thirteen years, held a fifty percent interest in a business which he managed and stood to lose $500 monthly income as well as his investment if deported. While $500 monthly may have had far greater value thirty years ago, the principal of the case has not lost its currency.

The adverse economic impact of deportation in this case is far more significant for the respondent and his family than the majority acknowledges.[9] Trained in engineering, the respondent was unable to support himself and his family in Mexico. Today, as the one exhibit admitted by the Immigration Judge into the record illustrates, and as other news accounts confirm, the Mexican economy has been devastated, and the impact of that economic devastation continues to be felt throughout the entire country. As a result, the respondent clings to a position he found in this country, working long hours in a nursing home. Through the respondent's efforts and those of his wife, the family is experiencing modest economic success.

The majority should be more frank in acknowledging how much it will mean for the respondent to surrender these hard-won gains. In my view, the majority dismisses this potential hardship rather

[9] Although I will refer to the suffering of the family, I realize that some of this suffering must be measured indirectly. See discussion, infra.

cavalierly, commenting only that economic conditions in Mexico "are likely to result, at least temporarily" in a lower standard of living. Maj. at 6. Cf. Tukhowinich v. INS, supra. Indeed, the majority cites to the respondent's modest level of education and savings as though the positive factors of respondent's capability and resources negate any hardship. Would the majority be more sympathetic were he totally unskilled and destitute? I think not. Regrettably, in that instance they might simply claim a lateral move to another situation of outright poverty would be of little impact on the respondent.

I view these circumstances differently: even if he is fortunate enough to find some employment in Mexico, the respondent and his family can be expected to suffer a profound change in their living situations. Even assuming this change, in itself, does not constitute extreme hardship, it is unreasonable to imply, as does the majority, that this reversal of fortune will not have a major adverse impact on everyone in the family. Moreover, I find that the change in respondent's role as a provider and head of household in the United States to a situation of uncertain employment and possible poverty in Mexico is so fundamental as to amount to extreme hardship.

Third, family-based hardship from separation or relocation: In light of its place as a stated goal in our nation's immigration policy and a fundamental value in our society in general, family unification should be accorded a prominent place in our assessment of hardship. I believe, and the courts increasingly support the proposition, that our analysis should pay full attention to the range of family relationships that individual aliens have established in this country, and the impact upon them if those relationships are severed. See Kahn v. INS, 36 F.3d 1412 (9th Cir. 1994). Tukhowinich v. INS, supra; Salameda v. INS, supra. Cf. Hector v. INS, 479 U.S. 85 (1986).

While the statute dictates only specific family members whose hardship may be considered, the applicant's own hardship relative to all relationships is relevant. See e.g., Tukhowinich v. INS, supra.; Salameda v. INS, supra. In particular, while not charged with being deportable, the respondent's wife and two non-citizen children have themselves been in this country for more than the threshold seven years required to establish statutory eligibility for seek suspension in their own right. Compare, Salameda v INS, supra. In my view, that arguably entitles me to consider the direct impact upon them of the respondent's deportation and their own involuntary departure in conjunction with it.

First, the record makes clear that the respondent will be

devastated whether he takes his United States citizen son with him, or whether, in the hopes of sparing his son the disadvantages and hardships of life in Mexico, he leaves that child behind in the United States. In light of my finding that the child (whose hardship I may consider directly) would experience extreme hardship in Mexico on multiple grounds, including economic, educational, and nutritional adversity, as well as emotional grounds both personally and in relation to his family's demise, I reject the majority's presumption that separation from the child would be the result of parental choice. Cf. Matter of Ige, supra.

Second, this factor is not limited to the specter of family separation. We should recognize the family-based hardship that will be experienced by the respondent even if his entire family accompanies him. Although the majority fails to address this component of hardship, I find that the respondent would experience hardship as the result of seeing his entire immediate family uprooted and relocated to a situation in which he cannot hope to support them economically and emotionally as he does presently. Tukhowinich v. INS, supra; Salameda v. INS, supra.

Finally, in his testimony, the respondent updated his written suspension application. He testified that his mother and all his siblings are now citizens or lawful permanent residents of the United States. Additionally, he testified that he has virtually no family in Mexico upon whom he can rely for assistance or succor if he is forced to depart this country. Nor, in the 10 years that he has been in the United States, has he maintained relationships with the friends he once had in Mexico. Even if the respondent is partially mistaken about the immigration status of some of his siblings, their presence in this country and their absence in Mexico does mean that he and his amity will be without support if they are forced to return to that country.

We should also be frank about the extent to which any potential family support, economic or psychological, in the alien's native country can be expected to lessen the impact of forced departure. In my view, the majority indulges inappropriately in efforts to assuage the reality of their ruling; the level of separation that the respondent will experience if deported, whether accompanied by all or part of his immediate family, cannot simply be mitigated by their conjecture that the "respondent's mother and siblings could visit and maintain contact with him". Maj. at 7. The respondent's separation from his family and support system, not to mention the potential separation from his son, is another genuine personal hardship whose adverse impact on respondent is significant.

Fourth, any other attachments to U.S. society: In assessing the

impact of forced departure from this country, we must pay full attention as well to the range of social, religious, political and cultural activities in which the aliens are active. It is important to recognize the extent to which individual aliens have established personal identities encompassing non-economic aspects of their life in this country. Alternatively, it is essential that we pay fair recognition to the important personal dimension that accompanies the ability to give, contribute or to help others, either socially or financially. The loss of this ability is clearly a major source of hardship. See, e.g., Salameda v. INS, supra; Tukhowinich v. INS, supra.

Life in the United States means more than a job to the respondent and his wife. Although they are at the low end of the economic spectrum in their community, they have sacrificed, in the classic immigrant tradition, to send their children to the parish school run by their church. The respondent made clear in his testimony that it was important to him and his wife that their children have the opportunities that they were not given. The respondent's family never relied on public assistance or depended on anything other than their hard work to succeed. Rather, the letters of support -- from his pastor, from his employer, from families of former residents at the nursing home where he works, and from his friends in the community -- all demonstrate that the respondent has forged strong and positive social ties to the community in which he and his family live. The fact that he and his wife and two children are here without legal immigration status does not make their contribution any less concrete just as it does not make the emotional impact of their forced departure any less genuine for the respondent. He will see his family wrenched from the setting in which they are prospering and, on his account, forced to return to place where their future is uncertain at best.

Fifth, health considerations: It is the unusual case in which this factor is determinative, although ironically, this Board's commentary in our published decisions might suggest otherwise. Nevertheless, health considerations are a common element in most suspension applications. Like financial factors, they might not be sufficient by themselves to establish be considered extreme, but certainly are part of the aggregate.

The extent to which the respondent experiences the burden of his immigration status was made clear in his testimony and that of the psychologist. He suffered an episode of panic disorder brought on by anxiety over the possibility of deportation and sought treatment in a hospital emergency room thinking he was having a heart attack. The psychologist testified that the respondent's six year-old son is likewise genuinely worried about the prospect of his family's

relocation to a foreign country. Moreover, as the psychologist testified, this impact will be particularly hard on the respondent's son, who will suffer not only because he is forced into an unwanted departure, but because others in the family upon whom he must depend will also be making the trip unwillingly.

The majority rejected without reason the expert's opinion that both the respondent and his son would suffer extreme emotional hardship. The majority notes, in particular, that the record contains no evidence that the respondent does not suffer from any condition that would not be treatable in Mexico. Maj. at 7. While perhaps neither the respondent's symptoms or his son's are proof of extreme hardship, I see no reason to give them any less credence or any less weight than this board gave to the uncorroborated assertion of a medical problem in Matter of Pena-Diaz, supra where we treated a claim of a child's congenital heart ailment as a cognizable factor in determining hardship. At a minimum, I believe the emotional cost to respondent and his son must be acknowledged as factors that will add to the totality of the hardship.

Sixth, particular conditions in the country of return: Beyond economics and health, there are a wide-range of factors that will impact upon aliens who return to their native countries. Some are rooted in cultural differences, others are particular factors such a civil war, religious tension, or racial intolerance. These factors may not rise to the level of persecution supporting an asylum claim, but they are genuine items for consideration in an extreme hardship analysis. See, e.g. Blanco v. INS, 68 F.3d 642 (2d Cir. 1995) (violence in homeland, even if not constituting persecution, is a factor in assessing extreme hardship). In this case, the problems in the Mexican economy have been discussed above.

Not only must these and other case-specific factors be examined individually; the adjudicator, whether the Board or the Immigration Judge in the first instance, must attempt to state how the accumulation of these individual hardships in the aggregate is assessed. It is not sufficient merely to announce as does the majority, that these factors have been considered cumulatively. Instead, we must show that we have attempted to analyze the way in which the difficulties will be compounded. In this case, there is evidence that each of the factors discussed above constitutes some significant degree of hardship to the respondent. Taken individually, I find the wrenching of the respondent from his present role as provider for his family, as well as the hardship to his son whether he remains or follows the family, to be extreme in their own right; even if not extreme in their own right, coupled with the projected emotional hardship to respondent and his family upon relocating, the severing of substantial extended family ties,

the anxiety he is experiencing, the loss of the stake he has put down in this country, including his home and community ties, all combine to meet a level of hardship I believe is extreme in this case. These factors do not amount merely to a disruption of routine inconvenience, or the normal stress caused by relocating. Rather, the anticipated family separation and economic detriment "combine(s) . . . to make deportation extremely hard on the alien or the citizen . . . members of his family. Matter of Anderson, 16 I&N Dec. 596, 598 (BIA 1978).

C. Discretionary Considerations

A suspension claim generally involves two findings: whether the alien meets the statutory requirements for relief, and, if so, whether the alien merits relief in the exercise of discretion. In this case the letters introduced on the respondent's behalf and the proffered testimony do more than establish his good moral character or suggest an aspect of hardship if he is deported. There are clear and eloquent evidence of his value as a member of the community. Similarly, he never sought welfare benefits in this country and has complied with U.S. laws, including the obligation to pay taxes and file tax returns.[10] Since there are no adverse discretionary factors present in this case, I would conclude that the respondent is entitled to a favorable exercise of discretion.

CONCLUSION

I believe the decision of the majority is erroneous as a matter of fact and law and I would grant the requested relief.

Lory D. Rosenberg
Board Member

[10] I would disregard the Immigration Judge's suggestion that the respondent erroneously claimed deductions for certain family members, as I note that pertinent sections of the Internal Revenue Code allow a taxpayer to claim household members for whom he provides over fifty percent of their support as dependents, section 152(a), and allows the taxpayer to claim as dependents children residing in contiguous countries such as Mexico, section 152(b)(3).